IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

No. 418

CURTIS M. SIMPSON, Warden, Kilby Prison,
Montgomery, Alabama,

Petitioner,

vs.

WILLIAM S. RICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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CITATIONS

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the United States District Court for the Middle District of Alabama granting the petition for writ of habeas corpus is dated May 30, 1968, and is unreported to date. This opinion and the judgment thereon is printed in Appendix A and A-1 on pp. 12-14, of the Petition for Writ of Certiorari filed herein.

The opinion of the United States District Court for the Middle District of Alabama granting the respon-

dent's motion to file in forma pauperis his application for a writ of habeas corpus, dated July 17, 1967, is reported as *Rice v. Simpson*, 271 F. Supp. 267, and is printed as Appendix B on pp. 15-18 of the Petition for Writ of Certiorari and is on pp. 1-5 of the Record.

The opinion of the United States District Court for the Middle District of Alabama granting the writ of habeas corpus is dated September 26, 1967, is reported as *Rice v. Simpson*, 274 F. Supp. 116, and is printed as Appendix C of Petition, pp. 19-32 and is on pp. 57-73 of the Record.

JURISDICTION

Petitioner has sought to invoke this Court's jurisdiction under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

I

When illegal sentences are set aside on post-conviction review and Respondent is re-tried and convicted on the same charges, may the State of Alabama punish Respondent for having exercised his constitutional right of post-conviction review by increasing his original sentences three times greater than originally imposed?

II

When Respondent serves two years, six months, and twelve days on sentences thereafter declared to be void because of a State Court error, may the State of Alabama then re-try him for the same crimes and upon

conviction increase his sentences threefold, and also deny him any credit on such sentences for the time previously served?

STATEMENT

The Respondent, William S. Rice, upon his pleas of guilty in four Alabama State Court criminal cases, was sentenced to an aggregate of ten years in the State penitentiary. Thereafter, the judgment and sentences in each of said cases was set aside upon his application for a writ of error coram nobis and the proof offered in support thereof. The basis for such State Court's action was that Respondent was not represented by counsel on the first convictions as constitutionally required by *Gideon v. Wainwright,* 372 U. S. 335. Thereafter, he was retried in three cases and upon conviction in the same Circuit Court, before the same Circuit Judge, he was sentenced to a total of 25 years. The fourth case was nol prossed because of the absence of a key witness. Respondent was the first State prisoner to file a writ of error coram nobis in the Circuit Court of Pike County, Alabama after the *Escobedo* and *Gideon* decisions.

With reference to the uncontroverted facts, the District Court found:

> "Here, the State of Alabama offers no evidence attempting to justify the increase in Rice's original sentence.*** It is shocking that the State of Alabama has not attempted to explain or justify the increase in Rice's punishment—in these three cases, over threefold." (R. p. 69)

• • • •

"Under the evidence in this case, the conclusion is inescapable that the State of Alabama is punishing petitioner Rice for his having exercised his post-conviction right of review and for having the original sentences declared unconstitutional." (R. p. 70).

In concluding that under the facts of this case the State had violated the constitutional rights of the Respondent, the District Court below further held

"This court, after considerable study, has concluded that a sentence imposed by a court on retrial after post-conviction attack that is harsher than the sentence originally imposed—unless some justification appears therefor—violates the Due Process Clause of the Constitution of the United States." (R. p. 64).

. . . .

"This court does not believe that it is constitutionally impermissible to impose a harsher sentence upon retrial if there is recorded in the court record some legal justification for it." (R. p. 68).

In affirming the judgment of the District Judge on the basis of the District Judge's opinion, the Fifth Circuit Court of Appeals speaking through Judge Tuttle stated:

"It would be useless for us to add to the reasoning or conclusions announced by the Trial Court . . . . We, therefore, affirm the judgment of the Trial Court on the basis of Judge Johnson's opinion which is adopted as the opinion of this Court."

BRIEF AND ARGUMENT

The complete answer to the contentions of Petitioner is the clear and comprehensive opinion of the District Court which was adopted by the Fifth Circuit Court of Appeals. Such opinions completely refute every contention raised by Petitioner in this Court. Accordingly, we simply and respectfully refer your Honors to the opinion of the District Court, Appendix C of Petition, pp. 19-32, and Record pp. 57-73. The reading and study of such opinion should be sufficient for this Court to promptly deny the Petition for Writ of Certiorari filed herein.

QUESTION I

Petitioner has completely failed to set forth the main basis for the holding and opinion of the lower Courts, namely, that the Alabama State Court could not impose greater sentences on Respondent as punishment for his having exercised his constitutional right to and for having been successful in a post-conviction coram nobis proceeding. Petitioner ignores this main question and attempts to avoid the crucial issue by simply contending that the lower Courts erred in holding that the imposition of sentences upon Respondent on his second trials for the same offenses were unconstitutional. But Petitioner fails to set forth or disclose to this Court the reason for such opinions.

The matter of increased sentences upon retrial has been considered recently by several of the Federal District Courts and Circuit Courts of Appeal. In *Patton v. North Carolina*, 256 F. Supp. 225 (W. D. N. C. 1966), the District Court held that it would not be

constitutionally permissible to impose a harsher sentence upon retrial unless some justification was shown for it. The Fourth Circuit, in reviewing the case, did not agree that an increased sentence could be justified at all "even where additional testimony had been introduced at the second trial." *Patton v. North Carolina,* 381 F. 2d 636, (4 Cir. 1967). The First Circuit has held that a defendant's sentence could not be increased upon retrial, even where the trial judge stated the reason for the harsher sentence, unless the reason for the increase was based solely upon events subsequent to the first conviction. *Marano v. United States,* 374 F. 2d 583 (1 Cir. 1967).

Not only does the record in this case support the lower Court's opinions in the light of *Marano* and the two *Patton* decisions, Respondent submits that the evidence is sufficient to uphold the opinions even if the compelling logic of these decisions be ignored. Punishment cannot be imposed to penalize a defendant for exercising his right to pursue post-conviction remedies and to have an unconstitutional conviction set aside. *Short v. United States,* 344 F. 2d 550 (D. C. Cir. 1965). And that is exactly what the lower Courts found had occurred in this case.

The Fourth Circuit opinion in *Patton* and the opinion of the Courts below discuss in detail the several theories which support either the view that an increased sentence upon retrial is unconstitutional or the view that it is unconstitutional unless a legal justification therefor appears in the record. Briefly stated, such an increase may be said to offend basic concepts of due process, to constitute a denial of equal protection, and to violate the prohibition against double jeopardy.

To punish a prisoner for having exercised his post-conviction right of review is an obvious denial of due process. Less obvious, but no less unreasonable, is the conditioning of the right of post-conviction review upon an assumption of the risk of a more severe punishment should a constitutionally defective sentence be set aside, since the effect is to inhibit a person wrongfully tried by the State in the first instance from seeking a new trial.

Where, as in Alabama, there can be no increase in sentence after sentence is imposed, then it is a violation of the equal protection clause of the Fourteenth Amendment to deny that protection to that class of convicted criminals who elect to exercise post-conviction remedies. To do so is to unjustly discriminate against persons already denied a fair trial.

The courts below did not base their decisions upon double jeopardy grounds, although several courts have recently done so in spite of the half-century old case of *Stroud v. United States*, 251 U. S. 15, 40 Sup. Ct. 60, 64 L. Ed. 103 (1919).

The case of *Green v. United States*, 355 U. S. 184, 78 Sup. Ct. 221, 2 L. Ed. 2d 199 (1957), reversed a first degree murder conviction on retrial where the original conviction had been of second degree murder, the Supreme Court holding that the first jury had "impliedly acquitted" the prisoner of first degree murder. Several California courts have adopted the theory of *Green* and applied it in situations where, as in this case, longer sentences are involved but not different "degrees" of a crime. *People v. Ali*, 57 Cal. Rptr. 348, 424 P. 2d 932 (1967); *In re Ferguson*, 233

Cal. App. 2d 79, 43 Cal. Rptr. 325 (1965); *People v. Henderson*, 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P. 2d 677 (1963). These courts take the position that the prisoner was "impliedly acquitted" of any longer sentence than he actually received at his first trial and upon retrial can receive no greater sentence than before, lest he be reprosecuted for an offense of which he has been acquitted.

The Fourth Circuit, however, took a different approach in *Patton* and pointed out that in *Stroud* the Supreme Court did not consider that aspect of double jeopardy which prohibits multiple punishment for the same offense and which therefore prohibits any increase in punishment following retrial. For a brief examination of this theory see the discussion of the District Court decision in *Patton* in 80 *Harv. L. Rev.* 891 (1967).

Petitioner argues that "a defendant, in obtaining a new trial, assumes the risk of a more severe sentence than was first imposed . . ." The idea that in pursuing a new and fair trial a defendant consents to the possibility—or likelihood—of harsher punishment if again convicted is a cruel fiction. The unfairness of this proposition becomes glaringly apparent when one considers that it was the State's initial failure to give him a fair trial which created the situation, yet it is the defendant who the State would have "assume the risk" of increased punishment with no credit for time served if he seeks what was denied him in the first instance.

It is not true that the judgment below reduced the statutory maximum sentence as to Respondent. The State agreed on the first conviction that its interests

would be served by a lesser sentence and that sentence itself fixed the constitutionally permissible maximum sentence as to Respondent, in the absence of any legal justification for a longer sentence. The judgment below does not foreclose the possibility of increased sentences on a defendant's second trial, although if conscientiously adhered to, it would help to foreclose any appearance of improper motivation if the sentence is increased.

The District Court heard the evidence, including testimony that Respondent was the first prisoner to file a writ of error coram nobis in the Circuit Court of Pike County, Alabama, after the *Escobedo* and *Gideon* decisions, and the court was shocked by the unreasonable and unexplained increases in the sentences upon retrial. Its conclusion that Respondent was denied due process and the equal protection of the law upon resentencing is logical and just.

QUESTION II

Petitioner further contends it was constitutionally permissible for the Circuit Court of Pike County, Alabama, to deny credit to Respondent, on sentences imposed by valid judgments, for time served under a prior void conviction for the same offenses.

At the time Respondent's original convictions were vacated as the result of coram nobis proceedings in the State Courts, he had been in prison for over two and one-half years. (R. p. 61). When resentenced after his second trials, Respondent was not given credit on his new sentences for the time previously served. (R. p. 61). The District Court, citing *Hill v. Holman*, 255

F. Supp. 924 (M. D. Ala. 1966), and *Patton v. North Carolina,* 381 F. 2d 636 (4 Cir. 1967), held Respondent "constitutionally entitled, upon being resentenced . . . to be given credit for each of the days he had served upon the voided sentence . . ." While the lower Court based its judgment on the rule of due process, the denial of credit for prior time served in the same case also violates the constitutional protection against double jeopardy in that it constitutes multiple punishment for the same offense. *Patton v. North Carolina,* 381 F. 2d 636 (4 Cir. 1967).

Petitioner attempts to distinguish the factual situation in *Hill v. Holman,* supra, from the circumstances surrounding Respondent's imprisonment. The State reasons that when one of Hill's several sentences was vacated, the time he had served on that sentence was applied to the valid sentences because they "existed during the period such time was served." However, the State says in this case, because *all* and not *some* of Respondent's sentences were vacated, then he is not entitled to receive credit for the time served when resentenced for the same offenses, because once the original sentences were vacated no valid judgment was then pending against him to which the time served could attach. Respondent submits that this reasoning is without rhyme or reason—unless it be administrative red tape. It ignores the simple but important fact that Respondent was resentenced for the identical offenses for which he was originally sentenced, and suggests that Respondent is urging that a prisoner be allowed to serve a sentence prior to his conviction. Respondent is not attempting to have past prison time apply to a sentence for a crime not committed at the time of his

original prosecutions, and the lower Courts did not hold that this would be proper. Respondent was tried and sentenced for committing certain offenses; he served at least a portion of the punishment imposed because of these offenses; and he was retried by the *same* Court and resentenced by the *same* judge for committing the *same* offenses. While the case of *Newman v. Rodriquez*, 375 F. 2d 712 (10 Cir. 1967) does hold that time served need not be credited against a new sentence, it does not discuss the artificial factual distinction attempted by Petitioner in its brief. Should Petitioner's reasoning be followed, a prisoner sentenced on a single offense and later retried and resentenced for the same offense could be compelled to serve more time under the two sentences than the maximum punishment provided by law. A single offense was involved in *Patton*, as in the cases of *Holland v. Boles*, 269 F. Supp. 221 (N. D. W. V. 1967) and *Gray v. Hocker*, 268 F. Supp. 1004 (D. Nev. 1967), which hold that credit must be given. In the latter case, the court said:

> "While this Court does not subscribe to the penal philosophy that incarceration is a quid pro quo for the offense committed and is a debt the defendant owes society, the realities are that even if penitentiary confinement is deemed the best available means of rehabilitation and reformation, the earlier service under the void sentence would have been effective toward those ends. It is "a denial of fundamental fairness, shocking to the universal sense of justice" (Betts v. Brady, 1942, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595), that a prisoner who has successfully voided the sentence then being served should be required to forfeit the months or even years of

such incarceration as a condition to the exercise of his legal rights. [268 F. Supp. at 1008]."

It seems noteworthy that the unreported Alabama Court of Appeal's decision in *Goolsby v. State*, 6th Div. 202, holds that the service of prior time is one of several items which must be considered by the trial court on resentencing upon second conviction, and the record must show that it was considered. In this case the record is silent as to any proper consideration of the prior time having been given.

The lower Courts also held that Respondent would be entitled to credit for "good time" earned during his several periods of incarceration, (R. pp. 63 & 72). *Short v. United States*, 344 F. 2d 550 (D. C. Cir. 1965); *Hill v. Holman*, 255 F. Supp. 924 (M. D. Ala. 1966); see also *Hoffman v. United States*, 244 F. 2d 378 (9 Cir. 1957); and *Youst v. United States*, 151 F. 2d 666 (5 Cir. 1945). Although the lower Court found that Respondent did not earn any "good time" while serving his first sentences, it went on to compute the "good time" earned since resentencing. (R. pp. 61 & 72). Petitioner does not now seem to object to the computations of the lower Court on the question of credit for good time and we accordingly assume that the State now concedes that such portion of the opinion of the lower Court was correct.

CONCLUSION

For the reasons outlined above, Respondent submits that the orders of the lower Courts are supported by both the law and the evidence and that the petition for certiorari should be denied.

Respectfully submitted,

Oakley Melton, Jr.

Oakley Melton, Jr.
Attorney for Respondent

I, Oakley Melton, Jr., Attorney for Respondent, and a member of the bar of this Court, hereby certify that I have mailed a copy of the foregoing Brief, postage prepaid, to the Honorable MacDonald Gallion, Attorney General of Alabama and to the Honorable Paul T. Gish, Jr., attorneys for Petitioner, at the Attorney General's Office, Montgomery, Alabama.

This 23 day of September, 1968.

Oakley Melton, Jr.

Attorney for Respondent